IN THE

Supreme Court of the United States

OCTOBER TERM 1976

No. 76-749

PFIZER INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, SQUIBB CORPORATION, OLIN CORPORATION and THE UPJOHN COMPANY,
Petitioners,

—against—

THE GOVERNMENT OF INDIA, THE IMPERIAL GOVERNMENT OF IRAN, THE REPUBLIC OF THE PHILIPPINES and THE REPUBLIC OF VIETNAM,
Respondents.

PETITIONERS' JOINT REPLY BRIEF IN SUPPORT OF THEIR PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JULIAN O. VON KALINOWSKI
515 South Flower Street
Los Angeles, California 90071

JOE A. WALTERS
3800 IDS Tower
Minneapolis, Minnesota 55402

JOHN H. MORRISON
200 East Randolph Drive
Chicago, Illinois 60601
Attorneys for Petitioner Pfizer Inc.

MERRELL E. CLARK, JR.
40 Wall Street
New York, New York 10005
Attorney for Petitioner Bristol-Myers Company

ROBERTS B. OWEN
888 Sixteenth Street, N. W.
Washington, D.C. 20006
Attorney for Petitioner The Upjohn Company

SAMUEL W. MURPHY, JR.
WILLIAM J. T. BROWN
30 Rockefeller Plaza
New York, New York 10020

PETER DORSEY
2400 First National Bank Building
Minneapolis, Minnesota 55402
Attorneys for Petitioner American Cyanamid Company

ALLEN F. MAULSBY
One Chase Manhattan Plaza
New York, New York 10005
Attorney for Petitioners Squibb Corporation and Olin Corporation

GORDON C. BUSDICKER
1300 Northwestern Bank Building
Minneapolis, Minnesota 55402
Attorney for Petitioners Bristol-Myers Company, The Upjohn Company, Squibb Corporation and Olin Corporation

January 10, 1977

INDEX

TABLE OF AUTHORITIES

Cases

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Petitioners respectfully submit this reply brief in support of their petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

QUESTION PRESENTED

Are foreign countries "persons" entitled to sue for treble damages under section 4 of the Clayton Act, 15 U.S.C. § 15 (1970)?

FURTHER STATEMENT

Since the filing of the petition in these cases, the District Court has dismissed the case of the defunct Republic of Vietnam, and counsel for Vietnam have filed notice of appeal.[1]

REPLY TO RESPONDENTS' ARGUMENT

Respondents do not deny the fundamental importance of the question presented, nor that the practice of this Court sanctions review by certiorari of important questions which have been decided by the Court of Appeals pursuant to the Interlocutory Appeals Act, 28 U.S.C. § 1292(b)[2]. Rather, respondents assert that the question presented "does not merit immediate consideration by this Court" (Opp. Br. 4); that, unlike respondents themselves, other foreign governments will not "flock" to our courts to seek treble damages (Opp. Br. 9); and that "the passage of time since the District Court decision of 1971 [in a related case, subsequently dismissed] has diminished the asserted importance of this question." Opp. Br. 11.

We submit, however, that events since the Arab Oil Boycott of 1973 have increased the need for a decision by this Court whether foreign governments may claim treble damages under our antitrust laws. The decision of the Court of Appeals was itself an important judicial development which, for the first time, affirmed the existence of this novel cause of action at the appellate level and brought the opportunity for review by this Court.

1. *The Republic of Vietnam* v. *Pfizer, Inc.*, No. 4-71 Civ. 402 (D. Minn. Dec. 2, 1976) (order dismissing action), *appeal noticed* (8th Cir. Dec 23, 1976). Respondent's theory appears to be that the *Vietnam* case should merely be "suspended" as diplomatic relations may be established with the present Vietnamese government. *See Pfizer Inc.* v. *Lord and The Republic of Vietnam*, 522 F.2d 612, 613 n.3 (8th Cir. 1975), *cert. denied*, 424 U.S. 950 (1976).

2. *See* cases cited, Petition (hereafter "Pet.") at 10.

Respondents' chief argument appears to be that petitioners' counsel should have obtained an earlier appellate decision so as to bring the issue to this Court even sooner, and that, in view of an alleged lack of diligence, "[t]he asserted importance of this issue is negated." Opp. Br. 9. Respondents do not contend that they were prejudiced by the alleged delay. Their argument is not relevant to qualification of the issue as "an important question of federal law which has not been, but should be, settled by this court." Sup. Ct. Rule 19(1)(b). The argument is also wrong on the facts.[3]

3. Contrary to respondents' suggestion (Opp. Br. 2), petitioners timely moved in 1971 to dismiss *both* the *Kuwait* and *Vietnam* cases, the only such cases then pending. When their motion was denied in the *Kuwait* case, they sought and obtained leave to appeal the "person" issue to the Court of Appeals. That appeal was dismissed only when Kuwait decided to withdraw its claim. Respondents argue that the appeal was "not mooted" (Opp. Br. 3) because, in a footnote to its opinion in the *Kuwait* case, the District Court had said that the same holding "will apply" to the *Vietnam* case. *In Re Antibiotic Antitrust Actions*, 333 F. Supp. 315, n.1 (S.D.N.Y. 1971). But the District Court had not entered an order in the *Vietnam* case (because "it raises additional issues," *id.*) and the Court of Appeals had not agreed to hear an appeal in that case.

Faced with activity on many fronts in this consolidated litigation, the District Court did not enter another order on the "person" question until January 16, 1974, this time in the *Philippines* case. Respondents' assertion that "defendants declined the invitation of the Philippines to seek immediate certification" (Opp. Br. 3) is unsupported by citation to the record and is belied by the portion of the record reprinted in respondents' own Appendix, for that transcript shows that both the Philippines' counsel and petitioners' counsel (Mr. von Kalinowski) had already asked the court to certify its decision for appeal. Opp. Br. App. 2a. When the court entered its decision on January 16, 1974, however, it chose not to include a certification. *See* Pet. App. C-8.

On June 25, 1974 petitioners timely renewed their request for certification in the *Philippines* case and urged the District Court to decide the "person" question in the *Vietnam* and *Iran* cases and to certify that decision, too. It was not until December 27, 1975 that the District Court decided to grant the request as to certification of the *Philippines* case (Pet. App. E-5, amending order, Pet. App. C-1); ruled for the first time that plaintiffs Vietnam, Iran and India were also "persons"; and certified its decision in the latter cases as well. Pet. App. D-2, E-5.

The true significance of respondents' digression upon proceedings in the District Court appears to be that they cannot find genuine reasons why this Court should not review the decision of the Court of Appeals.

A. Reply as to "Congressional Intent"

Respondents would obscure the fact that the Court of Appeals reached its conclusion despite the belief of five of the eight judges sitting *en banc* that Congress had no "legislative intent whatsoever" as to grant of the treble damage right to foreign governments. Pet. App. B-8, A-2. Respondents insist that the Eighth Circuit did indeed find a "Congressional intent to include foreign governments as persons" (Opp. Br. 6), but the claim is based on a single sentence from the majority opinion, which confirms that this Court's decision in *Georgia* v. *Evans* was the sole basis for the imputation of an intent to Congress.[4] Three of the six members of the majority made this point clear indeed when they stated in concurrence:

> [We] think the result is mandated by *Georgia* v. *Evans* . . . . [We] believe, however, that Congress . . . gave no consideration nor did it have any legislative intent whatsoever, concerning the question of whether foreign governments are 'persons' under the Act.
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> Concurrence of Judge Ross, Pet. App. B-7-8; joined by Chief Judge Gibson and Judge Webster, Pet. App. A-1. *See also* dissent of Judges Bright and Henley, Pet. App. A-2.

Thus, three judges in concurrence and two in dissent formed a majority of the Court of Appeals who could find no basis for imputation of a genuine intent to Congress.

4. "In view of the holding in [*Georgia* v. *Evans*, 316 U.S. 159 (1942)] that Congress intended domestic state governments to have standing to sue for treble damages under the antitrust laws, we conclude that Congress intended other bodies politic, such as a foreign government, to enjoy the same right." Pet. App. B-7.

Respondents do not deny that in 1874, upon enactment of the Revised Statutes, and only sixteen years before passage of the Sherman Law, Congress had purposely narrowed the statutory definition of "person" so as to omit "bodies politic" from the list of entities to which "the word 'person' may apply and be extended" in federal statutes.[5] Instead, respondents describe the amendment as "a weak reed indeed from which to attempt to derive the requisite degree of importance to merit Supreme Court review." Opp. Br. 7. But it is the question presented which is important. The amendment shows that the question was wrongly decided.

Congress was indeed aware, as respondents suggest (Opp. Br. 8), that our courts had sometimes described governments as "artificial" persons entitled to vindicate their property rights in court. *E.g., Cotton* v. *United States*, 52 U.S. (11 How.) 229 (1850); *see The Sapphire* 78 U.S. (11 Wall.) 164 (1870). That is one of the reasons why Congress took care upon enactment of the Revised Statutes in 1874 to limit the statutory rights conferred upon such governments by legislative reference to "persons." The purpose of the 1874 amendment becomes significant indeed because respondents have found nothing in the legislative background to indicate an intent to extend the treble-damage right to foreign governments.[6] The Court of Appeals based

5. *See* 1 U.S.C. § 1 (1970); interpretive statute originally enacted as Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431, repealed and superseded retroactive to the date of initial enactment by Act of June 22, 1874, 18 Stat., pt. 1, at 1, 1092, enacting Rev. Stat. tit. 1, ch. 1, § 1 into positive law. For the purpose of the 1874 amendment, *see* Revisers' Note, 1 *Revision of the United States Statutes as Drafted by the Commissioners* 19 (1872).

6. Senator Edmunds was thinking of individuals when he said that "anybody, without respect to the amount in controversy, may bring suit . . ." *See* Opp. Br. 8 n.11. In the same speech he used "anybody" interchangeably with "any man." *See* 21 Cong. Rec. 3149 (1890). Senator Sherman himself had said that the private damage action was available to "citizens of the United States." *Id.* 2564.

its decision solely upon the result this Court reached in *Georgia* v. *Evans*, without analysis of policy. In deciding the case on that basis, the judges of the Court of Appeals in effect invited this Court to review the scope of its own prior decision.

B. Respondents' Authorities Give Them No Support

Respondents argue that the Court of Appeals was not wrong on the merits, but the authorities they cite give no support. Thus, foreign sovereigns brought no "antitrust-type" suits between 1890 and 1914. Opp. Br. 8. The suits in question were brought in the interest of a private corporation or municipal body.[7] The suits concerned unfair competition, a common-law tort akin to fraud, not rights granted by federal statute. Respondents' reliance on the statement in *Nardone* v. *United States*, 302 U.S. 379, 384 (1937), that "the sovereign is embraced by general words of a statute intended to prevent injury and wrong" (Opp. Br. 8 n.10) is also misplaced, for this Court has established that "the sovereign," the United States itself, is not embraced by the reference to "persons" in this particular statute. *United States* v. *Cooper Corp.*, 312 U.S. 600 (1941).

The "executive interpretation" of the statute (*see* Opp. Br. 5), newly asserted in the lower courts, gives no guidance as to the intent of Congress in 1890. Respondents acknowledge that the Executive has previously sanctioned joint resistance by American companies against various oil-producing states (Opp. Br. 10 n.13), and the practice suggests a more traditional view on the part of the Executive that such governments have no right to seek treble damages.[8]

Finally, respondents suggest that Congress could not have intended that foreign governments acting in a proprietary capacity should have different rights or liabilities than foreign corporations, particularly government-controlled foreign corporations. Opp. Br. 11 n.16. Only last year, however, Congress recognized the special status of foreign sovereigns in providing that, even when acting in a proprietary capacity, a foreign state may not be held liable for "punitive damages," even though its "agency or instrumentality" may be so liable. 28 U.S.C.A. § 1606 (1976 Supp. IV).[9]

Since the filing of the petition herein, the Federal Trade Commission, too, has proposed a definition of the term "person" to be used in the recently-enacted Section 7A of the Clayton Act, 15 U.S.C.A. § 18a (1976 Supp. IV),[10] which provides that " 'person' shall not include any foreign

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7. In *French Republic* v. *Saratoga Vichy Spring Co.*, 191 U.S. 427 (1903), the French Republic was only "nominally the plaintiff" with "little" if any "interest in the litigation." The real party in interest was a private bottling company which leased the Vichy springs from the government. *Id.* 437-38. The same situation existed in *La Republique Francaise* v. *Schultz*, 94 Fed. 500 (S.D.N.Y. 1899), *aff'd*, 102 Fed. 153 (2d Cir. 1900). *City of Carlsbad* v. *Schultz*, 78 Fed. 469 (S.D.N.Y. 1897), and *City of Carlsbad* v. *Kutnow*, 68 Fed. 794 (S.D.N.Y.), *aff'd*, 71 Fed. 167 (2d Cir. 1895), both involved a municipality.

8. Respondents do not contest the relative novelty of their claims, but insist that the petition should have mentioned several *unreported* cases filed in the Eastern District of Pennsylvania in 1962 and said to have been the first in which a foreign government (India) claimed treble damages. Opp. Br. 10-11. But the District Court held that these cases had no value as precedent, since a government-controlled electric company (e.g., "the Damodar Valley Corporation") was a named plaintiff in each case and there was no evidence that India's right to sue, absent such a corporation, was placed in issue. *See In Re Antibiotic Antitrust Actions*, 333 F.Supp. 315, 316 n.3 (S.D.N.Y. 1971).

9. Foreign Sovereign Immunity Act of 1976, Pub. L. No. 94-583, § 4(a), 90 Stat. 2894 (Oct. 21, 1976).

10. Enacted by Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, tit. II, § 201, 90 Stat. 1390 (Sept. 30, 1976).

state, government or agency thereof (other than a corporation engaged in commerce or in any activity affecting commerce)." 41 Fed. Reg. 55490 (Dec. 20, 1976). The Antitrust Division of the Department of Justice concurred in this definition.[11]

Similarly, a recent decision of the United States District Court for the Southern District of New York holds that Congress did not intend the term "person," as used in the Securities Exchange Act of 1934, to embrace the Province of Newfoundland. *Greenspan* v. *Crosbie*, [1976] FED. SEC. L. REP. (CCH) ¶ 95,780 (S.D.N.Y. No. 74 Civ. 4734, Nov. 23, 1976).

These developments bring further confirmation that the Court of Appeals erred, and that the term "person," as used in federal economic legislation, should not be mechanically extended to include foreign governments without consideration of the purpose and intent of Congress.

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11. *See* 15 U.S.C.A. § 18a(d)(2)(A) (1976 Supp. IV); 41 Fed. Reg. 55488 (1976).

CONCLUSION

We respectfully submit that this petition should be granted, and the question now presented, which was left unresolved by the Court's contrasting decisions in *Georgia* v. *Evans*, 316 U.S. 159 (1942), and *United States* v. *Cooper Corp.*, 312 U.S. 600 (1941), should be settled without delay.

Respectfully submitted,

JULIAN O. VON KALINOWSKI
JOE A. WALTERS
JOHN H. MORRISON
Attorneys for Petitioner
Pfizer Inc.

MERRELL E. CLARK, JR.
Attorney for Petitioner
Bristol-Myers Company

ROBERTS B. OWEN
Attorney for Petitioner
The Upjohn Company

SAMUEL W. MURPHY, JR.
PETER DORSEY
WILLIAM J. T. BROWN
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ALLEN F. MAULSBY
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GORDON C. BUSDICKER
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